GUIDE TO HUMAN RESOURCE LAWS IN THE WORKPLACE

WORKERS' COMPENSATION BASICS

MARCH 23, 2018

9:00 – 10:30 a.m.

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AGENDA

INTRODUCTION

What is Workers' Compensation?

Workers compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his or her employer for the tort of negligence. The tradeoff between assured, limited coverage and lack of recourse outside the worker compensation system is known as "the compensation bargain." Any doubt concerning the right of compensation must be resolved in favor of a claim. *See, e.g., Strate v. Labor Commission*, 2006 UT App 179, 136 P.3d 1273; *Heaton v. Second Injury Fund*, 796 P.2d 676 (Utah 1990); *Prows v. Industrial Commission*, 610 P.2d 1362 (Utah 1980); *Chandler v. Industrial Commission*, 184 P. 1020 (Utah 1919).

U.C.A. § 34A-2-105(1) provides that the right of an injured worker to recover "for injuries sustained by an employee, whether resulting in death or not, is the exclusive remedy against the employer and is the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this chapter is in place for any and

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all other civil liability whatsoever, at common law or otherwise...." Stated differently, the injured worker's exclusive remedy for restitution is through worker's compensation. The claimant may maintain **no private civil action** against the employer or its agents or officers.

UTAH WORKERS' COMPENSATION ACT:

A CAREFUL BALANCING OF CONSTITUTIONAL RIGHTS

Rights of Employer	Rights of Injured Worker and/or Dependent Heirs
1. Exclusive Remedy under U.C.A. § 34A-2-105 – Action can only be brought in administrative proceedings. 2. Speedy Resolution under U.C.A. §§ 34A-2-801 & 802 – No lengthy jury trial with its attendant uncertainties. Less costly process for the litigants. 3. Limited, predictable, fixed damages. a. No damages for pain and suffering. b. No projected future special damages. Damages are paid as they accrue. 4. Broad-based risk spreading on industry through mandatory insurance or qualifying through bonding with Labor Commission to be a self-insured employer. U.C.A. § 34A-2-201. 5. Right to be reimbursed from third-party recoveries (minus injured worker's attorney fees and costs incurred in collecting from the third-party tortfeasor). U.C.A. § 34A-2-106. a. Employer – "trustee" of the cause of action for the injured worker (or dependent heirs in death cases). b. Subrogation Rights (U.C.A. §§ 34A-2-106(5)(b), 78B-5-819, and 78B-5-821) – 40% subrogation and third-party defendant damage limitation rule in third-party civil actions brought by injured workers (or dependent heirs in death cases). 6. All employers treated alike.	1. A sure, predictable – though limited – remedy because of mandatory insurance coverage. Less costly to pursue than litigation. 2. No-Fault system – no reduction or elimination of workers compensation benefits due to comparative fault. 3. Comparatively speedy and inexpensive administrative process. U.C.A. §§ 34A-2-801 7 802. 4. Wage Replacement Benefits a. Temporary Total Disability (U.C.A. § 34A-2-410) b. Temporary Partial Disability (U.C.A. § 34A-2-411) c. Permanent Total Disability (U.C.A. § 34A-2-413 d. Death Benefits to Dependent Heirs (U.C.A. § 34A-2-414 5. Impairment/Loss of Bodily Function Benefits (Permanent Partial Disability). U.C.A. § 34A-2-412. 6. Medical Expense Benefits. U.C.A. § 34A-2-401. 7. Preservation of right to pursue third parties for full damages. U.C.A. § 34A-2-106. 8. Employer and Employee on the same side in third-party cases. 9. Continuing jurisdiction of the Labor Commission to modify awards based on changes in injured employee's condition. U.C.A. § 34A-2-420. 10. All employees treated alike.

ESSENTIAL POLICIES AND PROTOCOLS TO HAVE IN PLACE

Required Coverage

With very few exceptions, every employer in the State of Utah is required to provide workers' compensation coverage for all its employees. *See* U.C.A. § 34A-2-201. Businesses with no employees may not be required to carry workers' compensation coverage. For example, sole proprietorships, partnerships, and limited liability companies in which the owners perform all the work and have no employees may not be required to have workers' compensation coverage. *See* U.C.A. § 34A-2-104.

Other types of insurance – such as general health insurance policies and liability insurance policies – do not cover workplace injuries or illnesses, nor do they provide the disability and dependents' benefits required by the Utah Workers' Compensation Act. Furthermore, only workers' compensation coverage gives employers the protection of the workers' compensation system's "exclusive remedy" provisions.

Consequences for an employer's failure to obtain workers' compensation coverage are severe and include:

- Penalties of at least $1,000.00;
- Injunctions prohibiting continued business operations; and
- Loss of the protection of the "exclusive remedy," which means that the employer and its employees can be sued in court for damages by an injured worker.

NOTE: Utah law requires employers to provide workers' compensation coverage and prohibits the cost of this coverage from being passed on to employees. Additionally, an employer cannot pay an injured worker's medical and disability benefits directly without going through the workers' compensation system.

Required Notices

Employers are required to post a notice that they are following workers' compensation laws. These notices, which must be placed in conspicuous locations at the place of business,

are available free of charge in English and Spanish at the Utah Labor Commission and on the Utah Labor Commission's website: www.laborcommission.utah.gov.

Reporting an Employee's Injury or Illness

Once an employer learns by any means or from any source of a workplace injury or illness, the employer must report the injury or illness within seven (7) days to its workers' compensation insurance carrier, or the employer may be subject to a penalty.

If an employer has failed to obtain workers compensation coverage, the uninsured employer should report the injury or illness directly to the Utah Labor Commission Industrial Accidents Division.

Employers may also be required to file a separate report of the occurrence to UOSH.

Injuries requiring only first aid treatment, either on-site or at an employer-sponsored free clinic, do not have to be reported. The Utah Labor Commission defines first aid and treatment as follows:

"First Aid" is medical care that is:

1. administered on-site or at an employer-sponsored free clinic; and
2. limited to the following:
    a. non-prescription medications at non-prescription strength:
    b. tetanus immunizations;
    c. cleaning and applying bandages to skin surface wounds;
    d. hot or cold packs, contrast baths, and paraffin;
    e. non-rigid support, such as elastic bandages, wraps, and back belts;
    f. temporary immobilization devices for transporting an accident victim, such as splints, slings, neck collars, or backboards;
    g. drilling a fingernail or toenail to relieve pressure, or draining fluids from blisters;

h. eye patches or use of simple irrigation or a cotton swab to remove foreign bodies not embedded in or adhering to an eye;

i. use of irrigation, tweezers, or cotton swab to remove splinters or foreign material;

j. finger guards;

k. massages;

l. drinking fluids to relieve heat stress.

3. "First aid" is limited to initial treatment and one follow-up visit within a seven-day period after the initial treatment, except that if first aid treatment was provided by a licensed health professional in an employer-sponsored free clinic, first aid includes initial treatment and two follow-up visits within a fourteen-day period after the initial treatment.

4. "First aid" does not include any treatment of a work injury that results in:

a. loss of consciousness;

b. loss of work;

c. restriction of work;

d. transfer to another job.

See Utah Administrative Code Rule R612-100-2(J).

NOTE: Even if an employer disputes the validity of an injury or illness, the employer must still report it. Reporting an alleged injury or illness is not an admission of liability. If the employer disputes the validity of a claim, it should contact its insurance carrier to explain why it does not believe a workers' compensation claim is valid.

What the Employer Should Do When a Claim Is Made

- Document the Accident
    - Pursuant to Utah Administrative Code Rule R612-200-1(A)(1), the employer's first report of an industrial accident should be submitted to the Labor Commission within 7 days of the accident. Correct wage information, number of hours the employee was scheduled to work on the week of the injury, and all information pertinent to the accident should be gathered and reported.
- Conduct an Immediate Accident Investigation
    - The following questions should be answered:
        - Did the accident happen while the employee was within the course and scope of his or her employment?
        - Who witnessed the accident? Have witness statements been taken?
        - Was the accident reported promptly, or was there a delay in reporting?
        - Is the injured employee still an employee of the company? If not, did the employee quit or was he or she terminated? How soon after the accident did the employee quit or was terminated?
        - Was an accident report submitted to the Labor Commission promptly?
        - Was the injured employee's statement taken?
        - What were the employee's wages at the time of the accident?
        - What was the employee's schedule/hours for the week of the accident?
- Notify the Workers' Compensation Insurer of the Accident and the Report of the Accident
- Determine what Non-Workers' Compensation Benefits Are Available (Social Security Disability, Short-Term Disability, Long-Term Disability, etc.)

- Determine Potential Personnel Issues
    - Employment history
    - Disciplinary issues
    - Other concurrent employment
    - Attendance history
    - History of prior injuries or claims
    - Retirement plans
- Work Closely with Insurance Adjusters and Retained Defense Counsel
- Determine of Light-Duty or Other Transitional Work is Available

DETERMINING REASONABLE ACCOMMODATIONS FOR INJURED WORKERS

"Reasonable Accommodation" Under the Americans With Disabilities Act (ADA)

- Employers must provide a reasonable accommodation to a disabled employee unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of its business." *See* 42 U.S.C. § 12112(b)(5)(A).
- The disabled employee needs only show that a requested accommodation is generally reasonable. It is the employer's obligation to demonstrate that a specific request for accommodation would create an undue hardship. *See, e.g., Rydalch v. Southwest Airlines*, 2011 WL 3349848, *7 (D. Utah 2011); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002).
- Factors to be considered in the "reasonable accommodation" v. "undue hardship" analysis. *See* 29 C.F.R. § 1630.2(p)(2).
    - The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees and the number, type, and location of its facilities;
- The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographical separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties, and the impact on the facility's ability to conduct business.

- Possible Accommodations under the ADA.
  - Restructuring jobs, including:
    - Elimination of non-essential tasks
    - Reassignment of work among coworkers
    - Development of non-traditional solutions for day-to-day tasks
    - **NOTE:** Employers are **not** required to eliminate **essential** job functions. *See, e.g., Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255, 1263 (10th Cir. 2009); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1192 (10th Cir. 2003); *Smith v. Blue Cross Blue Shield of Kansas, Inc.*, 102 F.3d 1075, 1076 (10th Cir. 1996), *cert. denied*, 522 U.S. 811 (1997).
  - Modifying work schedules
  - Removing physical barriers
  - Acquiring or modifying equipment or devices
  - Providing readers or interpreters

- Reassigning or transferring an employee to a vacant position
- Adjusting or modifying examinations, training materials, or policies
- Providing additional leave. *See, e.g.*, 29 C.F.R. § 1630.2(o); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002).

Light-Duty Assignment

- An employer may bring an injured employee back to work on a light-duty assignment if the assignment is reasonable and within the injured worker's capabilities as determined by a medical provider.
- An employer is not required to provide light-duty work assignments.
- If the light-duty assignment pays less than the injured worker's pre-injury wage, the employer is not required to pay the injured worker's pre-injury wage.
    - If there is a difference between the injured worker's pre-injury wage and the light-duty wage, the injured worker can apply to receive temporary partial disability compensation to help make up the difference.
- If the employer offers suitable light-duty work within documented medical restrictions, the injured worker is required to accept the work or risk losing his or her temporary disability compensation.
- The Utah Workers' Compensation Act does not prohibit an employer from discharging an injured worker if the worker can no longer perform his or her job. The employer must consider the following, however:
    - An employer cannot retaliate against an employee for filing a workers' compensation claim. *See Touchard v. La-Z-Boy, Inc.*, 2006 UT 71, 148 P.3d 945.
    - Termination of an injured worker who can perform the essential functions of his or her job may violate the Utah Antidiscrimination Act and the Federal Americans with Disabilities Act.

Utah Administrative Code Rule R612-200-5(D)

- For the purposes of Permanent Total Disability Claims, the Utah Administrative Code defines "Other Work Reasonably Available" as follows:
    - The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance or is within the distance the claimant was traveling to work prior to his or her accident;
    - The work is regular, steady, and readily available; and
    - The work provides a gross income at least equivalent to:
        - The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
        - The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

ISSUES WITH WORKERS' COMPENSATION INSURANCE

Types of Workers' Compensation Benefits

- Unpaid Medical Expenses. U.C.A. § 34A-2-418.
- Temporary Total Disability. U.C.A. § 34A-2-410; *Booms v. Rapp Const.*, 720 P.2d 1363, 1366-1367 (Utah 1986); *Griffith v. Industrial Commission*, 754 P.2d 981 (UT App. 1988).
- Temporary Partial Disability. U.C.A. § 34A-2-410.
- Permanent Partial Disability. U.C.A. § 34A-2-412.
- Permanent Total Disability. U.C.A. § 34A-2-413; Labor Commission Rule R612-1-10; *Heaton v. Second Injury Fund*, 796 P.2d 676 (Utah 1990); *Peck v. EIMCO Process Eqpt. Co.*, 748 P.2d 572 (Utah 1987); *Norton v. Industrial Commission*,

728 P.2d 1025 (Utah 1986); *Hardman v. Salt Lake City Fleet Management*, 725 P.2d 1323 (Utah 1986); *Marshall v. Industrial Commission*, 681 P.2d 208 (Utah 1984); *Buxton v. Industrial Commission*, 587 P.2d 121 (Utah 1978).

- Death. U.C.A. § 34A-2-414; *United States Steel Corp. v. Industrial Commission*, 613 P.2d 508 (Utah 1980).
- Interest on Unpaid/Accrued Compensation. U.C.A. § 34A-2-420; Labor Commission Rule R612-1-5; *Heaton v. Second Injury Fund*, 796 P.2d 676 (UT App. 1990); *Marshall v. Industrial Commission*, 704 P.2d 581 (Utah 1985).
    - **NOTE:** The right to interest waived if not contained in compensation agreement. *Pacheco v. Industrial Commission*, 668 P.2d 553 (Utah 1983).
- Rehabilitation Assistance. U.C.A. § 34A-2-413.
- Travel Expenses and Per Diem Reimbursement. Labor Commission Rule R612-2-20.
- Willful Neglect Penalty. U.C.A. § 34A-2-301.
- Reimbursement of Paid Medical Expenses. U.C.A. § 34A-2-418.
- Recommended Medical Care. U.C.A. § 34A-2-418.

Statutes of Limitations

- **Reporting Industrial Accidents**
    - Under U.C.A. § 34A-2-407(2)(a), a claimant is required to report his or her claim "promptly." Under § 34A-2-407(3)(b), an employee who fails to notify his or her employer or the Labor Commission Division of Industrial Accidents within 180 days of an industrial accident is barred from any claim for benefits. In terms of what constitutes "notice," § 34A-2-407(4) identifies the following: (1) an employer's report of injury filed with the Division of Industrial Accidents or with the employer's workers' compensation insurance carrier; (2) a physician's injury report filed with the Division of Industrial Accidents, the employer, or the employer's workers'

compensation insurance carrier; (3) a workers' compensation insurance carrier's report filed with the Division of Industrial Accidents; or (4) the payment of any medical or disability benefits by the employer or the employer's workers' compensation insurance carrier. The witnessing of the accident by the employee's foreman or supervisor *may* also constitute notice.

- Under U.C.A. § 34A-3-108(2), the same 180-day reporting period applies in the case of occupational diseases. The statute begins to run, however, from the date that the employee first: (1) suffers disability from the occupational disease; **and** (2) knows or should have known that the occupational disease is caused by the employment. It is important to note that it is possible for the disability to occur without any time off from work (e.g., in cases of carpal tunnel syndrome).

- **Filing Applications for Disability Claims**
  - Under U.C.A. § 34A-2-417(2), an injured worker's claims for temporary total disability benefits, temporary partial disability benefits, permanent total disability benefits, or permanent partial disability benefits are barred unless the employee: (1) files an application for hearing within six (6) years of the date of the industrial accident; and (2) is able to meet the employee's burden of proving that the employee is due the compensation claimed within twelve (12) years from the date of the accident. Under U.C.A. § 34A-3-109(2), the same statute of limitations applies to disability claims resulting from an occupational injury.
- **Medical Expenses Compensation**
  - Under U.C.A. § 34A-2-417(1), claims for medical expense compensation must be submitted to the employer or the employer's workers' compensation insurance carrier within 1 year from the later of: (1) the date on which the medical expense is incurred; or (2) the date on which the

employee knows or should have known that the medical expense is related to the industrial accident. Prior to 2007, future medical expenses could be terminated if an injured worker failed to receive medical treatment for 3 consecutive years and failed to submit expenses for payment (except for cases involving permanent total disability claims and prosthetic devices). This provision was repealed in 2007. In 2010, the current § 34A-2-417(1)(b) was added.

- Under U.C.A. § 34A-3-107, employees making claims for disability compensation resulting from an occupational disease are entitled to the same medical expense compensation as outlined above. The procedures and payments of benefits under this section are the same as in § 34A-2-417(1).

- **Death Benefits**
  - Under U.C.A. § 34A-2-417(3), a claim for death benefits must be filed within 1 year of the date of the employee's death. This statute of limitations is tolled during the period of a dependent's minority. *See Bonneville Asphalt v. Labor Com'n*, 2004 UT App 137, 91 P.3d 849. Under U.C.A. § 34A-3-109(3), a claim for death benefits resulting from an occupational disease must also be filed within 1 year of the date of the employee's death.
- **Travel Expenses**
  - Under Utah Administrative Code Rule R612-300-8(B)(1), all requests for travel reimbursement must be submitted within one year of the date that the subject travel expenses were incurred. It should be noted that there is no statute that provides for travel reimbursement. There is some question, therefore, as to whether this rule can be valid. The validity of Rule R612-300-8 has not been tested in the courts.

Elements of a Compensable Claim

- **"Course and Scope of Employment"**

- U.C.A. § 34A-2-401(1) provides that to be compensable the industrial accident must have occurred within the course and scope of the claimant's employment. This includes the direct and primary duties of the assigned job as well as those things that are reasonably necessary and incidental thereto. *See Hafer's Inc. v. Industrial Commission of Utah*, 526 P.2d 1188 (Utah 1974).
- "Going and Coming Rule"
  - While traveling to or from work, the employee is not considered to be in the course and scope of employment, if the injury occurs while traveling to or from work, not on the employer's premises, and while the employee furnished his or her own transportation. *See Soldier Creek Coal Co. v. Bailey*, 709 P.2d 1165 (Utah 1985); *Kinne v. Industrial Commission*, 609 P.2d 926, 927 (Utah 1980); *Barney v. Industrial Commission*, 506 P.2d 1271, 1272 (Utah 1973); *Lundberg v. Cream O' Weber*, 465 P.2d 175 (Utah 1970); *Wilson v. Industrial Commission*, 440 P.2d 23, 24 (Utah 1968); *Bailey v. Utah State Indus. Commission*, 398 P.2d 545 (Utah 1965); *Wilson v. Industrial Commission of Utah*, 207 P.2d 1116 (Utah 1949); *Fidelity & Casualty Co. v. Industrial Commission*, 8 P.2d 617, 618 (Utah 1932).
  - Exceptions to the "Going and Coming Rule"
    - The employer furnished the transportation for the employer's benefit. *See Kinne v. Industrial Commission*, 609 P.2d 926 (Utah 1980).
    - The employer required the employee to use a vehicle as an instrumentality of the business. *See Bailey v. Utah State Indus. Commission*, 398 P.2d 545 (Utah 1965).

- The employee was injured while upon a "special errand" or "special mission" for the employer. *See State (Tax Com'n) v. Industrial Com'n of Utah*, 685 P.2d 1051 (Utah 1984); *Bailey v. Utah State Indus. Commission*, 398 P.2d 545 (Utah 1965); *Wilson v. Industrial Commission of Utah*, 207 P.2d 1116 (Utah 1949) (dictum); *Chandler v. Industrial Commission of Utah*, 208 P. 499 (Utah 1922).
- Ingress and egress at the place of employment are inherently dangerous ("special hazards on normal route"). *See Cherne Const. V. Posso*, 735 P.2d 384 (Utah 1987); *Bountiful Brick Co. v. Industrial Commission of Utah*, 251 P. 555 (Utah 1926); *Cudahy Packing Co. of Nebraska v. Industrial Commission of Utah*, 207 P. 148 (Utah 1922).
- The employee combined pleasure and business on a trip, and the business part predominated. *See Ogden Standard Examiner v. Industrial Com'n of Utah*, 663 P.2d 88 (Utah 1983); *Martinson v. W-M Inc. Agency, Inc.*, 606 P.2d 256 (Utah 1980) (dictum).
- Employees, such as traveling salesmen, who supervise themselves in situations where the employee is working on behalf of the employer on non-employment time. *See Hafer's Inc. v. Industrial Commission*, 506 P.2d 1271 (Utah 1973); *Kinne v. Industrial Commission*, 609 P.2d 926 (Utah 1980); *Barney v. Industrial Commission*, 506 P.2d 1271, 1272 (Utah 1973).

- **Unexpected or Unintended Occurrence**
  - Even though a claimant may have experienced similar pain, if, on the date of the accident, the pain is different, or it was not expected to occur because

of the exertion, it will be considered unexpected or unintended. Therefore, the injury will be considered to have occurred "by accident" under the Utah Workers' Compensation Act. *See* U.C.A. 34A-2-105(1); *Allen v. Industrial Com'n*, 729 P.2d 15 (Utah 1986).

- **Legal Causation**
  - Legal causation can be broken down into two subparts: (a) No Preexisting Condition; and (b) Preexisting Condition Present.
    - No Preexisting Condition
      - If the claimant has no preexisting conditions – that is, no preexisting medical disposition that would predispose the claimant to an industrial injury – almost any work exertion will satisfy the legal causation requirement provided it is the medical cause of the injury. It becomes critical to investigate the claimant's medical background to determine if there are any preexisting conditions. *See Allen v. Industrial Com'n*, 729 P.2d 15 (Utah 1986).
      - **NOTE:** While it is permissible to investigate the claimant's medical history once a claim is filed, it is not permissible to question a potential employee about a medical condition that may predispose them to injury as hiring criteria. Only after a job has been tentatively offered to the potential employee may the employee inquire as to medical history.
    - Preexisting Condition
      - The case of *Allen v. Industrial Com'n*, 729 P.2d 15 (Utah 1986), established that if the claimant has a preexisting condition contributing to the injury, he or she must demonstrate that there were "unusual or extraordinary" circumstances or work effort that caused the injury. The

"unusual or extraordinary" work-related exertion must be something outside of or greater than typical non-employment exertions." Stated differently, they must show that it is not something that would have occurred in their normal, everyday life affairs. This means that the comparison is not to normal work activities, but to normal life affairs. Examples of normal exertions are: taking out the garbage, lifting children, and carrying suitcases. Lifting weights up to approximately 50 lbs. has been found to be within the normal exertions of everyday life.

- The case of *Acosta v. Labor Com'n*, 2002 UT App 67, 44 P.3d 819, established that the *Allen* criteria apply to asymptomatic preexisting conditions. This only further emphasizes the need to obtain a detailed medical history form the injured worker.

- **Medical Causation**
  - Medical causation is often considered to be presumed. It is still the claimant's burden, however, to demonstrate that the injury is, medically, the result of a work-related exertion, strain, or stress. *See Intermountain Health Care, Inc. v. Board of Review of Indus. Com'n of Utah*, 839 P.2d 841 (Utah App. 1992)
  - Additionally, medical causation may be difficult to prove in such cases as heart attacks or other internal failure cases such as carpal tunnel syndrome. *See Workers' Compensation Fund v. Industrial Com'n of Utah*, 761 P.2d 572 (Utah 1988); *Pittsburg Testing Laboratory v. Keller*, 657 P.2d 1367, 1370 f.n. 1 (Utah 1983); *Stouffer Foods Corp. v. Industrial Com'n of Utah*, 801 P.2d 179 (Utah 1990).

- Medical causation is also difficult to assess in "aggravation" cases where subsequent, non-industrial factors may be present. *See Utah Auto Auction v. Labor Com'n*, 2008 UT App 293, 191 P.3d 1252; *Crosland v. Board of Review of Indus. Com'n of Utah*, 828 P.2d 528 (Utah App. 1992); *Standard Coal Co. v. Industrial Commission of Utah*, 252 P. 292 (Utah 1926).

Other Types of Claims

- **Industrial Disease Claims**
  - Utah is very liberal in its definition of Occupational Disease. U.C.A. § 34A-3-103 defines occupational disease as "any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment."
  - In terms of liability for an occupational disease where multiple employers are involved, the key is how long the employee was employed by the last employer. U.C.A. § 34A-3-105 dictates that the last employer is liable for the entire occupational disease so long as the employee was: (1) injuriously exposed to the hazards of the disease by that employer; (2) the employment by that employer was a substantial contributing medical cause: and (3) the employee was employed by that employer for at least twelve consecutive months. If the employee was not employed by the final employer for twelve consecutive months, medical and disability benefits may be apportioned with prior employers based upon causal contribution to the occupational disease. Out-of-state employment and non-work-related employment within the State of Utah is excluded from apportionment.
- **Mental Stress Claims**
  - Mental stress claims are recognized in Utah. How the case will be approached will be determined by whether the claim was made prior to May 1, 1995, when Utah adopted a comprehensive mental stress statute. It is

doubtful at this juncture (2018) that any new, pre-1995 mental stress claims could be legitimately filed. It is possible that some pre-1995 claims are still pending to be resolved, but that is also unlikely. As such, only the comprehensive mental stress statute will be addressed here. The statute is located at U.C.A. § 34A-2-402. For the sake of brevity, it will not be set forth here. It should also be noted that the Utah Occupational Disease Act also recognizes mental stress claims and the language mirrors that of the mental stress act itself. *See* U.C.A. § 34A-3-106.

- By way of summary, the 1995 statute provides that under either an accident or an occupational disease claim, the requirement of an extraordinary stimulus is judged according to an objective standard compared to contemporary national employment and non-employment life, not just the stress sustained by those in the claimant's profession. *See Wood v. Labor Com'n*, 2005 UT App 490, 128 P.3d 41. "Good faith employer personnel actions" cannot form the basis of a compensable mental stress claim. *See Eastern Utah Broadcasting v. Labor Com'n*, 2007 UT App 99, 158 P.3d 1115. As such, look for the claims to be made under the premise that the employer's personnel actions were made in bad faith.

- **Repetitive Trauma Claims**
  - Utah recognizes a repetitive trauma claim. *See Carling v. Industrial Commission*, 399 P.2d 202 (Utah 1965). While similar to an occupational disease claim, the repetitive trauma claim can be made with possibly even less specificity. Essentially, the employee need only allege that the repetitive nature of the work eventually culminated in the injury suffered. *See Nyrehn v. Industrial Com'n of Utah*, 800 P.2d 330 (Utah App. 1990), *cert. denied*, 815 P.2d 241 (Utah 1991) *Hone v. J. F. Shea Co.*, 728 P.2d 1008 (Utah 1986) These injuries range from shoulder, hip, or knee problems all the way to disc herniation. While an injured worker must still meet each

element of their burden of proof, the repetitive trauma claim will usually meet the threshold requirements needed to state a claim and survive a motion to dismiss.

- **Horseplay**
  - Horseplay can be one of the more frustrating claims for any employer. Horseplay claims are very difficult to defend. The case of *Prows v. Industrial Commission of Utah*, 610 P.2d 1362 (Utah 1980), held that there must be a "substantial" or "serious" deviation from the normal employment activities, to take the injury out of the course and scope of employment. The extent to which horseplay has become a regular part of the employment environment and whether the employment would or may be expected to include some horseplay are also considered. These factors have been liberally construed. In the *Prows* case, the employees were engaged in a "fight" where they were flipping rubber bands at one another. When the injured worker attempted to flip a piece of wood in a slingshot" fashion, the wood flipped back into his eye, causing him severe injury. This was held to be a compensable industrial claim.
  - Utah courts have established a four-part test for determining whether an injury during horseplay is one arising "out of or in the course of employment." *See J & W Janitorial Co. v. Industrial Com'n of Utah*, 661 P.2d 949, 950 (Utah 1983).
    - The extent and seriousness of the deviation from employment;
    - The completeness of the deviation;
    - The extent to which the horseplay has become a part of the employment; and
    - The extent to which the nature of the employment may be expected to include some such horseplay.

Resolving Claims

- **Commuted Settlements**
    - Utah allows for commuted settlements. A commuted settlement is defined as a settlement on a full and final basis where there is no dispute. A commuted settlement allows the employer/carrier to settle claims for a lump sum payment of future entitlements, forever ending the injured worker's claims to benefits.
    - In a typical commuted settlement situation, an application to the Labor Commission is not even filed. Rather, the employee and the carrier, often with the assistance of a physician, have determined the employee's need for future medical care and have come to an agreement on a "rating" of the employee's total impairment resulting from the accident.
    - Pursuant to U.C.A. § 34A-2-420(4), any commuted settlement must be filed with the Labor Commission for its approval. The settlement agreement will be judged on a "manifestly unjust" standard. If the settlement is not patently unfair, it will likely be approved by the Labor Commission.
    - **NOTE:** The Labor Commission has, of late, been less apt to approve commuted settlement agreements. For a commuted settlement to receive approval, it must be fairly specific in its documentation of the future medical needs, and the costs associated therewith, of the injured worker. Without such documentation, the Labor Commission will reject the commuted settlement.
- **Litigating Claims**
    - All the nuances of a litigated claim need not be discussed herein. A couple of points should be made, however.
    - First, the importance of the employer obtaining witness statements and gathering as much information about the alleged industrial accident as possible immediately following the injury cannot be over-emphasized.

Claims before the Labor Commission move very quickly, and it is important that the employer move quickly to secure all necessary information immediately following the accident. The greater the amount of time between the accident and the collection of evidence, the greater the chance for memories to fade, evidence to be lost or destroyed, and for undue influence to occur.

- **Note:** In many industrial accident claims, the claimant will contend that they were lifting or moving an object that weighed a great amount. As noted above, however, weights up to 50 lbs. have been held not to meet the unusual or extraordinary test. As such, it may be advisable for the employer to actually maintain the item in their possession or to be able to provide a witness who can testify as to the weight of the object the claimant was moving at the time of the injury. Otherwise, the employer may be stuck with the employee's testimony, which will invariably put the weight to such an amount that it will meet the *Allen* test.

- Second, once an Application for Hearing has been filed, it becomes the responsibility of the employer, and the workers' compensation insurance carrier to gather all the medical records regarding the claimant that they intend to submit as evidence at the time of any hearing. While the Medical Records Exhibit is submitted to the Court jointly, it is the insurance carrier that carries the ultimate responsibility in this regard. The employee has a responsibility to identify all his or her medical providers and the employer/insurance carrier should obtain all identified records as quickly as possible. This will aid not only in further assessing the claim but in preparing for the hearing should that become necessary.
- Third, after conducting discovery (gathering records, taking depositions, asking and answering interrogatory questions, etc.), the case may be settled.

Like a commuted settlement, the parties submit a settlement agreement regarding a "disputed" claim for approval by the Labor Commission pursuant to U.C.A. § 34A-2-420(4). As with the commuted settlement, a full and final settlement of a disputed claim cuts the employee off from any future claims that might arise because of the industrial injury.

- Additionally, after discovery, it might appear that the only disputed issues are medical in nature. In such a case, the parties may stipulate to have the matter referred directly to a Medical Panel for their review and opinion on the medical issues (i.e., medical causation, impairment, future medical care and treatment). The general guidelines governing Medical Panel evaluations are found in U.C.A. §§ 34A-2-601 to –604 and Utah Administrative Code Rule R602-2-2. Once the medical panel issues its report, which can take several months, the parties may object to the findings. Assuming there are no objections, the Administrative Law Judge will decide and issue his or her Findings of Fact, Conclusions of Law and Order. The parties then have 30 days to object to the Order and file a Motion for Review with the Labor Commission. After a decision by the Labor Commission, either party will have 20 days to appeal the findings of the Labor Commission to the Utah Court of Appeals.
- If no settlement can be reached and the case is not referred to a medical Panel, the matter will go to a hearing before an Administrative Law Judge of the Labor Commission. A formal hearing, which is rather informal in practice, is held at the Labor Commission, at which time both sides present argument, call witnesses, and submit evidence to the ALJ. Thereafter, the ALJ will issue his or her Findings of Fact, Conclusions of Law and Order. As discussed above, if a party disagrees with the ALJ's Order, it can be appealed to the Labor Commission. The general guidelines governing Labor

Commission Hearings are found in U.C.A. §§ 34A-2-801 to –803 and Utah Administrative Code Rule R602-2-1.

- Maximum of 1.5 hours scheduled for each case.
- Formal rules of Evidence are inapplicable to a workers' compensation claim, but Administrative Law Judges are getting more rigid about such matters.
    - Labor Commission, Commissioner, Administrative Law Judge, or the Appeals Board not bound by the usual common law or statutory Rules of Evidence and Civil Procedure, per U.C.A. § 34A-2-802.
    - Hearsay admissible. *See, e.g., Wilson v. Industrial Commission*, 735 P.2d 403 (UT App. 1987); *Schmidt v. Industrial Commission*, 617 P.2d 693 (Utah 1980).
    - Non-technical Rules of Evidence given great latitude. *See, e.g., Gardner v. Edward Gardner Plumbing & Heating, Inc.*, 693 P.2d 678 (Utah 1984).
    - Questions of law may be addressed on the record alone without an evidentiary hearing. *See, e.g., Mecham v. Industrial Commission*, 692 P.2d 783 (Utah 1984).
- The burden of Proof is on Applicant.
- No Opening or Closing Statements.
- All medical reports generally admitted without serious objection.
- Interim Order may be requested if some, but not all, issues have been resolved following the hearing.

Common Defenses to Workers' Compensation Claims

- Lack of Coverage

- Lack of Dependency. *See Wengert v. Double 00 Hot Shot*, 657 P.2d 1343 (Utah 1983); *Dahl v. Industrial Commission*, 735 P.2d 667 (UT App. 1987).
- No Accident Occurred
- Accident Not Reported. *See USSC v. Industrial Commission*, 607 P.2d 807, 812 (Utah 1980).
- Statutes of Limitation Expired. *See* U.C.A. § 34A-2-417; Labor Commission Rule R612-2-20.
- Injury Did Not "Arise Out Of" Employment
- Injury Did Not Occur "In The Course Of" Employment
- Lack of Factual Causation
- Absence of Corroborating/Supporting Medical Reports
- Claimant Lacks Credibility
- Employee Willful Misconduct. *See, e.g.,* U.C.A. § 34A-2-302; *Salt Lake County v. Labor Commission,* 2009 UT App 112, 208 P.3d 1087; *Lopez v. Kaiser Steel Corp.*, 660 P.2d 250 (Utah 1983).

Recent Developments at the Labor Commission

Utah Administrative Code Rule R602-2-1

- This rule substantially changes how a claim is litigated. The rule was promulgated to streamline the litigation process. In reality, the rule places a tremendous burden on the employer and the workers' compensation insurance carrier to accomplish all discovery immediately upon the filing of a claim.
- Perhaps the greatest change brought about by the rule is found in subsection R602-2-1(I)(3). This section states that parties must now file a "pre-trial disclosure" 45 days in advance of the hearing. The disclosure must identify the following:
    - Fact witnesses the parties intend to call at the hearing;
    - Expert witnesses the parties intend to call at the hearing;

- Language translators the parties intend to use at the hearing;
- Exhibits, including reports, the parties intend to offer in evidence at the hearing;
- The specific benefits or relief claimed by the petitioner;
- The specific defenses that the respondent intends to litigate;
- Whether a party anticipates that the case will take more than four hours of hearing time;
- The job categories or title the respondents claim the petitioner can perform if the claim is for permanent total disability; and
- Any other issues that the parties intend to ask the administrative law judge to adjudicate.

- This rule is being enforced and evidence will be excluded if it is not identified in the pre-trial disclosure form.
- Rule R602-2-1(I)(3) also brings about a tremendous change with respect to permanent total disability claims.
  - U.C.A. § 34A-2-413(1) places the burden of proof on the injured employee to prove each element of his or her claim. One such element is to demonstrate that there is no other work reasonably available to the injured worker given his or her age, education, past work experience, medical capacity and residual functional capacity. *See* U.C.A. § 34A-2-413(1)(c)(iv).
  - Rule R6020201(I)(3) appears to shift the burden of proof in this regard to the employer and the workers' compensation insurance carrier to demonstrate that there is other work reasonably available and to identify the job categories the employer and insurance carrier believe the injured worker is capable of working.

- This is an enormous shift and it is highly questionable whether the Labor Commission has the authority to enforce this rule when it appears to run contrary to U.C.A. § 34A-2-413.

Utah Administrative Code Rule R612-200-5

- Another rule change that substantially affects permanent total disability cases occurred with the changes made to Rule R612-200-5. R612-200-5(D)(1)(c) states that other work reasonably available is further defined to mean:
  - The work provides a gross income at least equivalent to:
    - The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
    - The wage the claimant was earning at the time of the accident if the employee was earning less than the state average weekly wage then in effect.
- Given that the current state average weekly wage is $817.00, the employer and the insurance carrier must find a suitable employment that will pay more than $20.43 per hour. This eliminates a good portion of all jobs in the labor market.
- Again, it is questionable whether this rule will be enforceable if and when it is reviewed by the Utah Supreme Court.

Utah Injured Worker Reemployment Act (U.C.A. §§ 34A-8-101 to -304)

- U.C.A. §§ 34A-8-101 to –304 has technically been a valid statutory provision over the past several years.
- In the past, however, it was not enforced, so much so that it was not even included in the 2000 or 2002 edition of the *Utah Workers' Compensation Laws and Rules Annotated*, published by Lexis Publishing.

- Over the past decade, the Labor Commission indicated its intent to "revive" the rule and begin its enforcement.
- In the 2014 Utah legislative session, H.B. 10 repealed the Utah Injured Worker Reemployment Act. Many of the provisions of the Act were amended to the Workers' Compensation Act, specifically to U.C.A. § 34A-2-413.5. H.B. 10 was passed by the Legislature on February 13, 2014, and was signed by the Governor on April 1, 2014. The bill went into effect on May 13, 2014.

Attorneys Fees

- Prior to 2016, Petitioner's Attorneys' Fees were regulated and fixed by Labor Commission. *See* U.C.A. § 34A-1-309.
    - Attorneys fees for Petitioners was determined by a sliding scale, based on the amount of recovery, with a cap of $15,250.00 at Labor Commission. *See* Utah Administrative Code Rule R602-2-4.
- On May 18, 2016, the Utah Supreme Court held U.C.A. § 34A-1-309 and Rule R602-2-4 unconstitutional. *Injured Workers Ass'n of Utah v. State*, 2016 UT 21, 374 P.3d 14.
    - The Utah Constitution vests exclusive authority to regulate the practice of law with the Utah Supreme Court. This authority includes the regulation of attorneys' fees. The Supreme Court cannot delegate this authority to either the Utah Legislature or the Utah Labor Commission.
    - The impact of this decision has yet to be determined.